AHMANI SDN BHD v. PETRONAS PENAPISAN (MELAKA) SDN BHD & OTHER CASES

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[ORIGINATING SUMMONS NO: 24C(ARB)-11-03-2015, 24C(ARB)-19-04-2015, 24C(ARB)-21-05-2015 & 24C(ARB)-22-05-2015]
10 JUNE 2015

ARBITRATION: *Award – Setting aside – Application for – Questions of law – Whether setting aside part of award could only be made under s. 37(1)(a)(v) of Arbitration Act 2005 – Award based on unpleaded and unclaimed matter – Whether tribunal could make its findings based on issue which was never presented or argued before it – Whether tribunal could award sum which was not claimed – Whether tribunal acted beyond its jurisdiction – Whether there was a breach of rules of natural justice – Whether intervention warranted*

The plaintiff ('Ahmani') was appointed by the defendant ('Petronas') in a project to extend its warehouse ('the said project'). Petronas subsequently terminated its contract with Ahmani. Ahmani challenged the termination and the dispute was referred to arbitration. Petronas also counterclaimed for additional costs incurred in completing the balance of the works left uncompleted by Ahmani. The arbitration tribunal ('tribunal') allowed Ahmani's claim of RM260,019.92. At the same time, Petronas' counterclaim of RM312,564.24 was also allowed. As such, the tribunal allowed the counterclaim to be set off against Ahmani's claim. In awarding Petronas' counterclaim, the tribunal had found that Petronas had acted reasonably and fairly in terminating the contract. However, in the absence of evidence from third party contractors on the amount of expenses incurred to complete the said project, the tribunal went on to consider what was a fair amount incurred by the respondent to support its counterclaim. In considering what was fair amount, the tribunal used the inflation factor in calculating Petronas' additional cost. It was this specific issue of inflation when calculating Petronas' additional costs that Ahmani contended that the tribunal had gone wrong quite aside from its other contention that the tribunal had awarded on an unpleaded and unclaimed matter. Ahmani further claimed that the award contained decisions on matters beyond the scope of the submission to the tribunal which contravened sub-paras. 37(1)(a)(v) and 37(1)(b) of the Arbitration Act 2005 ('AA') and raised questions of law under s. 42 of the AA. Under s. 42, Ahmani offered four questions of law which it claimed emanated out of the award; namely (i) whether the tribunal could award a sum which was not pleaded; (ii) whether the tribunal could award a sum which was not claimed; (iii) whether the

tribunal could make its findings based on an issue which was never presented or argued before it; (iv) whether by not inviting parties to present or argue on the issue which formed the basis of its decision, the tribunal had acted beyond its jurisdiction and breached the rules of natural justice.

Held (allowing application with costs):

(1) The cause papers have not properly intituled the relevant provisions of the AA that were relied on by Ahmani. There should be stricter detailed setting out of the particular grounds of challenge. Sub-para. 37(1)(a)(iv) of the AA was not properly invoked as Ahmani was seeking to set aside only a part of the award *ie* the counterclaim. That being the case, only sub-para. 37(1)(a)(v)of the AA could be relied on as read together with sub-s. (3) of the AA, it allowed for those parts of the award which contained decisions on matters which had not been submitted to arbitration to be set aside. Sub-para. 37(1)(b)(ii) of the AA could not be invoked because again, this ground led to the setting aside of the whole award and not just the part complained of. (paras 35 & 36)

(2) The complaint raised here was that there was a breach of natural justice during the arbitral proceedings or in connection with the making of the award when the tribunal dealt with the factor of inflation without first inviting the parties to submit or address on the factor. If indeed such an allegation were true, then it would be the whole award which will be tainted and not just that part identified by the complainant. The provisions of s. 37 of the AA did not appear to allow the court to sever as it may in cases of allegations of violations of sub-para. 37(1)(a)(iv) of the AA. (para 39)

(3) The tribunal should not base its decision on matters that the parties have not submitted on. Any conclusion or finding reached nevertheless must be based on evidence placed before the tribunal. The tribunal had agreed with Ahmani on the lack of evidence or proof of Petronas' counterclaim for additional costs incurred to complete the contract. The parties did not address the tribunal on the factor of inflation and what would be a fair amount to 'support' Petronas' counterclaim. (paras 43-45)

(4) As the counterclaim was essentially a loss and expense claim, there must at the very least be some evidence adduced before the tribunal could come to the decision on the counterclaim. With lack of proof, the tribunal ought to have dismissed Petronas' counterclaim. (para 46)

(5) The tribunal proceeded to assess a 'fair amount incurred by the respondent'. It did this by computing and thereby indirectly proving Petronas' counterclaim for Petronas. This was where the tribunal had exceeded its jurisdiction. The tribunal ought to have invited parties to address or make further submissions first before it proceeded to consider and make this particular item of award. (paras 49 & 50)

(6) Since the award contained a decision on the matter of the inflation or even a decision on the matter of an assessment of a fair amount incurred by the respondent when there was a failure to prove the amount incurred in the first place, this decision was certainly beyond the scope of submission to arbitration by the parties. In such circumstances, the application came within sub-para. 37(1)(a)(v) of the AA. (para 52)

(7) On the challenge under s. 42 of the AA, the court agreed with Petronas that questions (i) and (ii) did not come within the test of being real, proper and valid questions of law. However, questions (iii) and (iv), were valid and proper questions of law which were in Ahmani's favour. The court must intervene where the award is manifestly unlawful and unconscionable. Under such circumstances, the court was inclined to agree with Ahmani that the tribunal's decision on the counterclaim must be set aside. It was, however, not for the court to substitute its views to the extent of exercising discretion on the award of nominal damages. It was appropriate and just to set aside that part of the award. (paras 54, 63 & 64)

Case(s) referred to:

Awangku Dewa Pgn Momin & Ors v. Superintendent of Lands & Surveys, Limbang Division [2015] 3 CLJ 1 CA ***(refd)***

Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791 CA ***(refd)***

Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA ***(refd)***

SDA Architects v. Metro Millennium Sdn Bhd [2014] 3 CLJ 632 CA ***(refd)***

Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd [2007] 3 SLR 86 ***(refd)***

The Government of India v. Cairn Energy India Pty Limited & Ors [2013] 1 LNS 1323 HC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 37(1)(a)(iv), (a)(v), (b)(ii), (2), (3), 38, 42

Companies Act 1965, s. 218

(Originating Summons No: 24C(ARB)-11-03-2015 & 24C(ARB)-19-04-2015)

For the plaintiff - Collin Victor (James Edwin Pusparatnam with him); M/s James Edwin & Co

For the defendant - Munawirah Mohamad (Mashitah Abdul Rahman with her); M/s Abdul Raman Saad & Assocs

(Originating Summons No: 24C(ARB)-21-05-2015 & 24C(ARB)-22-05-2015)

For the plaintiff - Munawirah Mohamad (Mashitah Abdul Rahman with her); M/s Abdul Raman Saad & Assocs

For the defendant - Collin Victor (James Edwin Pusparatnam with him); M/s James Edwin & Co

Reported by Sandra Gabriel

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JUDGMENT

Mary Lim J:

Introduction

[1] There are four related cases before the court, namely:

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i. 24C(ARB)-11-03-2015;

ii. 24C(ARB)-19-04-2015;

iii. 24C(ARB)-21-05-2015; and

C iv. 24C(ARB)-22-05-2015.

[2] The first two cases were filed by Ahmani Sdn Bhd (Ahmani) while the latter two were filed by Petronas Penapisan (Melaka) Sdn Bhd (Petronas). These four cases arise out of two arbitrations.

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[3] These two arbitrations in turn, arise out of disputes relating to two contracts between the same parties. For practical reasons, the parties agreed to conduct the two arbitrations together since the members of the arbitral tribunal were the same for both arbitrations. However, it was agreed that the arbitral tribunal was to render two separate awards since the two contracts were distinct in nature. The two arbitrations culminated in two separate

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awards which I shall refer to as Award One and Award Two. Both awards were rendered on the same date, 23 January 2015.

[4] In Award One, the arbitral tribunal dismissed Ahmani's claim with costs of the arbitration except for certain vacated fees and refresher where

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orders had already been ordered on earlier dates. In Award Two, Ahmani's claim of RM260,019.92 was allowed; but so was Petronas' counterclaim but only to the extent of RM312,564.24. The arbitral tribunal further allowed the counterclaim to be set off against the claim leaving a net effect of Ahmani to pay Petronas the sum of RM52,544.32. Both of Petronas' applications are to seek recognition and enforcement of the two awards.

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[5] There was no real challenge of Award One and by consent, the order for recognition and enforcement under s. 38 of the Arbitration Act 2005 (Act 646) was therefore granted in respect of prayer (i) with no order as to costs in 24C(ARB)-21-05-2015.

H **Award Two**

[6] In respect of Award Two, Ahmani's challenges are under ss. 37 and 42 of Act 646 and this account for both of the originating summons filed by Ahmani. Petronas' application is for the recognition and enforcement of Award Two under s. 38. I shall summarise the challenges and Petronas'

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responses to those challenges.

[7] But first, the award (henceforth this is to refer only to Award Two) and what the dispute was all about. Again, I shall only set out what is relevant for the purpose of understanding the present challenges.

[8] By letter of award dated 7 September 2009, Ahmani was appointed by Petronas in a project to extend its warehouse at PP(M)SB. The contract was on a fixed lump sum of RM868,234 and the contract period was from 7 September 2009 until 27 November 2009. The contract sum was to be paid as follows:

(i) 10% upon award and receipt of performance bond and insurance by Petronas

(ii) 40% upon completion of civil and structural works and acceptance by Petronas

(iii) 40% upon completion of mechanical and electrical and instrument works and acceptance by Petronas

(iv) 10% upon issuance of certificate of provisional acceptance and receipt of warranty bond by Petronas.

[9] The completion date was later extended to 15 July 2010. On 13 September 2010, Petronas issued a termination notice which took effect on 20 September 2010. The termination was challenged and the dispute was referred to arbitration.

[10] Three principal issues arose for determination by the arbitral tribunal:

(a) Whether the Petronas had acted reasonably in terminating the contract?

(b) What is the balance of the works not completed by Ahmani under the contract?

(c) Whether Ahmani is entitled to claim for the following:

(i) the balance of the contract sum of RM173,646.80

(ii) the value of material on site amounting to RM42,644

(iii) reimbursement for unpaid preliminaries amounting to RM312,268

(iv) variation order 1 (change of foundation) amounting to RM74,963.04

(v) electrical items supplied amounting to RM18,892.12

(vi) material and fabricated steel structure taken from Ahmani's sub-contractor's premises amounting to RM24,900

(vii) refund of bank guarantee of RM86,823.40

[11] The arbitral tribunal decided that the contract was rightly and lawfully terminated and it gave its reasons for so deciding in the award. As for the second issue, the arbitral tribunal decided that it was a "non-issue really because the parties agreed that 70% of the works under the project had been completed." Because Ahmani had only been paid "50% of the completion of the project but not the remaining 20%", the Arbitral Tribunal concluded that the 20% should be based on the contract sum and not the tender sum as was done by Ahmani.

[12] Although Ahmani's claim for materials on site was allowed, it was however, not successful in claiming for a reimbursement of unpaid preliminaries. The arbitral tribunal found that Ahmani had failed to prove its claim by producing documentary evidence eg, pay slip. Ahmani's claim for variation order also failed because Petronas had never agreed to such work. Items iii(e) and (f) were however allowed.

[13] As for the refund of the bank guarantee, this was rejected by the arbitral tribunal. Since Ahmani had failed to complete the project, Petronas was entitled to liquidate the performance bond (in the form of the bank guarantee). That meant that Ahmani was not entitled to a refund. The total amount awarded was RM260,019.92.

[14] The final matter that the arbitral tribunal dealt with was Petronas' counterclaim. Petronas' counterclaim was for additional costs of RM357,419.80 incurred in completing the balance of the works left uncompleted by Ahmani. That sum of RM357,419.80 was however resolved by Petronas in the following manner:

(a)	Additional costs incurred to complete the remaining 30% of the works	–	RM357,419.80
(b)	Liquidated and ascertained damages	–	RM 86,823.40
	Less		
(i)	Performance bond cashed	–	RM 86,823.40
(ii)	20% of the works accepted to have been completed and yet to be paid	–	RM173,646.80
Balance counterclaimed			RM 183.773

[15] So, although Petronas' counterclaim was for RM357,419.80, it had already "helped itself" to some part of that claim by making some deductions – see above and para. 74 of the statement of reply and counterclaim (Warehouse Extension Project) found at exh. "BBA1" p. 71 of Ahmani's affidavit filed in support of the originating summons (encl. 2).

[16] And, this is where Ahmani's complaints are seated. In the award, the arbitral tribunal said that because it had found that Petronas had acted reasonably and fairly in terminating the contract due to Ahmani's breach, "it follows therefore that the respondent is entitled to recover any loss and damages arising therefrom (art. 36.2 of the General Terms and Conditions of Contract)." The onus was however, on Petronas to show the loss and damages that it supposedly suffered.

[17] The arbitral tribunal added that "Obviously the respondent had the right to appoint third party contractors to do the remaining 30% of the project. We do not think that the claimant can challenge on this." What the arbitral tribunal found Ahmani had challenged instead was the "methodology of the appointment of third party contractors and the evidence in support of the sum paid to them by the respondent".

[18] Upon evaluation of evidence, the arbitral tribunal concluded that the appointment of the third party contractors was "carried out in a fair manner". It went on to "observe that the respondent did not appoint directly the third party contractors but asked for quotation from its list of contractors. The purpose of the negotiation, in our view, is surely to see that the quotation would be a fair one and obviously only then would a work order be issued".

[19] Moving on to the matter of proof of the sum paid to the third party contractors, the arbitral tribunal was "inclined to accept the contention of the claimant, the maker of the documents relied on should be called by the respondent in support thereof. Then the claimant can then question the witnesses as to the work carried out including the pricing of the materials etc used on the remaining 30% of the project. The only exception perhaps is where the contents of the documents are agreed by the parties which is not the case here."

[20] Because of this lack or "absence" of evidence, this is what the arbitral tribunal said:

> In the absence of evidence from the third party contractors to support their documents, we then have to consider what is a fair amount incurred by the Respondent to support its counterclaim.

[21] In considering what was a "fair amount", the arbitral tribunal said that "it is not disputed the balance 30% of the contract price is RM260,470.20." But, it did not stop there. It went on to say:

> It is common knowledge that unfinished job would cost more to be completed by another contractor. We would use the factor of 'inflation' in this case in the absence of oral evidence to support the documents for the benefit of the Claimant as obviously it has to foot the costs.

[22] After considering that "an inflation of 20% as reasonable", the arbitral tribunal calculated the additional costs as follow:

The balance of 30% of the contract price	RM260,470.20
Add 20% inflation	RM 52,094.04
	RM312,564.24

[23] The arbitral tribunal awarded Petronas the sum of RM312,564.24 as "additional costs incurred to complete the remaining 30% of the works". As one may recall, Petronas' claim was for a sum of RM357,419.80. However, after deducting for LAD and monies that it still had to pay Ahmani, Petronas' net counterclaim was a sum of RM183,773. Although the arbitral tribunal's decision on LAD is not questioned, it is worthwhile noting that the arbitral tribunal agreed with Petronas that it could set off the LAD as "reasonable amount to compensate the respondent for the losses" due to Ahmani's delay. In fact, Petronas had cashed the performance bond to set off the LAD calculated at the total sum of RM86,823.40.

[24] It is the specific issue of inflation when calculating Petronas' additional costs that Ahmani contended that the arbitral tribunal had gone wrong quite aside from its other contentions that the arbitral tribunal had awarded on an un-pleaded and unclaimed matter. The arbitral tribunal is said to have gone wrong by dealing with a matter or issue which Ahmani claimed was not brought up by the parties, that the parties were not alerted to and invited to address, that the award contains decisions on matters beyond the scope of the submission to arbitration which contravenes sub-paras. 37(1)(a)(v) and 37(1)(b) and raises questions of law under s. 42.

[25] Under s. 42, Ahmani offered four questions of law which it claims emanate or arise out of the award; namely:

a. Whether the honourable panel of arbitrators can award a sum which was not pleaded?

b. Whether the honourable panel of arbitrators can award a sum which was not claimed?

c. Whether the honourable panel of arbitrators can make its findings based on issue which was never presented or argued before it?

d. Whether by not inviting parties to present or argue on the issue which formed the basis of its decision, the honourable panel of arbitrators had acted beyond its jurisdiction and breached the rules of natural justice?

[26] Learned counsel for Ahmani argued that since the alleged additional costs was to complete the balance 30% of the works either by Petronas or some third party, Petronas should be solely liable to pay for the sum and not, Ahmani.

[27] Further, subject to proof, Petronas may only be allowed to counterclaim for additional costs incurred to complete the works. That means the costs incurred beyond the RM260,470.20 which is the price of the balance 30% of the contract. Since the arbitral tribunal agreed with Ahmani that Petronas had failed to prove this additional costs, then the arbitral tribunal ought to have, "at the most, awarded nominal damages". This 30% balance of the contract price ought never to have been awarded as there was no claim for such amount. It is in this sense that learned counsel for Ahmani argued that the arbitral tribunal had decided on an issue which was not pleaded; and therefore went beyond the scope of submission to arbitration.

[28] On this matter of inflation, both counsel for the respective parties agreed that the parties were not asked to address on this matter, be it on its relevance or application, before the arbitral tribunal came to a decision on the counterclaim; that this was never submitted or raised by either of the parties. In fact, it was contended by Ahmani that the issue was never even pleaded or claimed, let alone presented or argued. By not inviting the parties to present or argue on the issue which formed the basis of its decision on the counterclaim, Ahmani contended that the arbitral tribunal had acted beyond its jurisdiction and breached rules of natural justice.

[29] Ahmani contended that the questions will substantially affect the outcome of Petronas' counterclaim for additional costs to complete the remaining works; thus affecting the rights of the parties – see paras. 13 and 20 of affidavit filed in support (encl. 2).

[30] Learned counsel for Petronas contended that the four questions of law posed need not be considered as the questions have not met the requirements of s. 42. The questions are said to be not proper and valid questions of law.

[31] Learned counsel urged the court to dismiss the application *in limine* because the formulated questions of law are ambiguous and makes it difficult for them and also the court to "figure out the issue that needs to be determined or the particular law or the applicable principle the plaintiff is challenging". The relevant rules, case laws, legal principles and relevant facts have not been identified. Also, there is an element of inconsistency and confusion.

[32] Petronas argued that the questions are really questions of mixed fact and law and are in any case, not genuine and real. It was also contended that the questions arose out of the proceedings and not the award in which case, s. 42 does not operate. A restrictive approach is also advocated. Even if there is an error on the face of the award, that error must be one which renders the award manifestly unlawful and unconscionable.

[33] The award shows that the arbitral tribunal did not award Petronas the sum of RM260,470.20 as the additional costs; it was merely using the 30% balance of the remaining works as a basis to calculate the additional costs incurred by the defendant, in light of documentary evidence submitted by the defendant but "in the absence of oral evidence to support the documentary evidence".

Findings And Determination

[34] Having examined the award, these are the court's findings on the two challenges.

[35] First, the challenge under s. 37; specifically sub-paras. 37(1)(a)(iv) and (v); and (b)(ii); these are raised in 24C(ARB)-19-04-2015. The court observes that the cause papers have not properly intituled the relevant provisions of the Arbitration Act that are relied on by Ahmani. In view of the numerous grounds of complaint, this court takes the approach that there should be stricter detailed setting out of the particular grounds of challenge. This is not unlike the scenario one finds under s. 218 of the Companies Act 1965 where a petition is made to wind up a company. The responding party must be made well aware of the relevant provisions of the law which are invoked. Petronas has not taken issue on this. Perhaps, it is because one can generally decipher the particular ground upon perusal and scrutiny of the body of the originating summons and the affidavit filed in support.

[36] I must say that sub-para. 37(1)(a)(iv) is not properly invoked in the instant case as Ahmani is seeking to set aside only a part of the award (that which is in respect of the counterclaim); and not the whole award as there is that other part of the award which is in its favour. That being the case, only sub-para. 37(1)(a)(v) can be relied on as read together with sub-s. (3), it allows for those parts of the award which contain decisions on matters which had not been submitted to arbitration to be set aside.

[37] I must further say that sub-para. 37(1)(b)(ii) cannot be invoked because again, this ground leads to the setting aside of the whole award and not just the part complained of. Ahmani cannot choose or cherry pick. Its challenge must also be seen against those parts which are not challenged or complained of. When that is done, it will be seen that it is only asking for certain parts of the award to be set aside and not the whole award, which is what sub-para. 37(1)(b)(ii) is about.

[38] I am fortified in this regard from a reading of sub-s. 37(2). This sub-provision indicates that the complaint of conflict of public policy is in relation to the award or that the award contains decisions or decisions on matters which conflict with the public policy of Malaysia; and not just certain parts of the decision.

[39] In this case, the complaint is that there was a breach of natural justice during the arbitral proceedings or in connection with the making of the award when the arbitral tribunal dealt with the factor of inflation without first inviting the parties to submit or address on the factor. If indeed such an allegation is true, then it would be the whole award which will be tainted and not just that part identified by the complainant. The provisions of s. 37 do not appear to allow the court to sever as it may in cases of allegations of violations of sub-para. 37(1)(a)(iv). Mindful of the limited powers of intervention of the court, a restrictive approach is hereby adopted and applied.

[40] That leaves then a challenge under sub-para. 37(1)(a)(v). Here, proof must be offered to show that the award contains decisions on matters beyond the scope of the submission to arbitration. While the matter of the counterclaim was what was submitted to arbitration, undoubtedly, the award contains a decision on the factor of inflation and how it co-relates or affects, in any degree or respect with or in the matter of the counterclaim for additional costs. Whether the factor of inflation amounts to a matter within the meaning or intent of sub-para. 37(1)(a)(v) is one which this court must now determine.

[41] At the material time, the arbitral tribunal had found that there was no evidence on the costs of engaging third party because the maker of the documents relied on by Petronas were not called by Petronas. To this, the arbitral tribunal agreed with Ahmani that such person(s) "should be called by the respondent in support thereof. Then the claimant can then question the witnesses as to the work carried out including the pricing of the materials etc used on the remaining 30% of the project. The only exception perhaps is where the contents of the documents are agreed by the parties which is not the case here." The arbitral tribunal then went on to say that "In the absence of evidence from the third party contractors to support their documents ..." they had "to consider what is a fair amount incurred by the respondent to support its counterclaim". Looking further along in the award, it can be seen that the arbitral tribunal decided that it "would use the factor of 'inflation' in this case in the absence of oral evidence to support the documents for the benefit of the claimant as obviously it had to foot the costs". The arbitral tribunal decided to do so even though Petronas was not able to prove its loss or counterclaim because Ahmani obviously had to "foot the costs".

[42] Here, there are three points that must be made.

[43] In general, the parties have a right to be heard effectively on every issue that may be relevant to the resolution of the dispute. The overriding concern is fairness and the opportunity to be heard before the pronouncement or decision is made. Therefore, in keeping with that rule, the arbitral tribunal should not base its decision on matters that the parties have not submitted

on. Although the arbitral tribunal is not required to select any one of the arguments or approaches articulated by the parties, it is perfectly entitled to steer a middle course through all the arguments made in order to reach its own conclusions or findings; any conclusion or finding reached nevertheless must be based on evidence placed before the arbitral tribunal. While the arbitral tribunal does not have to consult the parties on its thinking process before finalising its award, it must consult the parties where the argument by which it reaches its decision is one which does not reasonably flow from any of the already argued or submitted premises – see *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, discussed in *The Government of India v. Cairn Energy India Pty Limited & Ors* [2013] 1 LNS 1323; [2013] MLJU 1278. Where the arbitral tribunal has done so, as is alleged here, then a case of a breach of natural justice is made out.

[44] Next, it is significant to note that the arbitral tribunal had already agreed with Ahmani on the lack of evidence or proof of Petronas' counterclaim for additional costs incurred to complete the contract. The arbitral tribunal had in fact given similar reasons when rejecting Ahmani's claim for reimbursement of unpaid preliminaries.

[45] Thirdly, and this is most important, both parties before the court today have agreed that the fact and factor of inflation was never addressed by the parties nor were the parties invited to do so. In fact, the parties did not address the position of what happens if the evidence of Petronas' witnesses are disbelieved or the witnesses are not competent to testify on the documentary evidence before the arbitral tribunal given that they are not the makers of those documents. The parties did not address the arbitral tribunal on the factor of inflation and what would be a fair amount to "support" Petronas' counterclaim. The parties only learnt about this matter for the first time from the award itself.

[46] Since the award has to be read in its entirety, and while claims and counterclaims may be separate and distinct claims, they frequently arise from the same facts or substantially the same facts; the whole reasoning of the arbitral tribunal must bear a measure of consistency. With a lack of proof, the arbitral tribunal ought to have dismissed Petronas' counterclaim since the whole object of Petronas' counterclaim was a recovery or reimbursement of additional costs that it had to incur or had incurred by reason of Ahmani's non-completion of the contract. Petronas had to get a third party to complete Ahmani's work. As the counterclaim is essentially a loss and expense claim, there must at the very least some evidence before the arbitral tribunal could come to the decision on the counterclaim.

[47] The court is in agreement that where there is absent evidence to prove a claim, the claim or counterclaim ought to have been dismissed. This is especially so in the matter of special damages and where the responding party, Ahmani had denied the contents of those claims and had put Petronas

to strict proof – see para. 30 of Ahmani's reply to statement of reply and defence to counterclaim. When the arbitral tribunal had clearly found there was none, and it said so repeatedly, it was obliged to dismiss the counterclaim especially where it had already recognised that the burden was on Petronas to prove its counterclaim. Where the arbitral tribunal wants nevertheless to make some award, I believe, at best, it can only award nominal damages.

[48] Instead, the arbitral tribunal proceeded to assess a "fair amount incurred by the respondent". It did this by computing and thereby indirectly proving Petronas' counterclaim for Petronas. It did so in the manner that was pointed out; that is, by using the balance of the contract value as the base figure and adding 20% on top of that value to represent the unfinished job which now "cost more to be completed by another contractor". It is actually unclear what was the arbitral tribunal's basis or reason for putting a 20% value to the factor of inflation, even if for one moment, inflation was a relevant and valid consideration in the circumstances.

[49] With respect, this is where the arbitral tribunal has exceeded its jurisdiction. Where the arbitral tribunal wants to do more, which it obviously wanted in this case, including introducing the matter or element of inflation, as well as offer its views as to the value of that factor of inflation; the arbitral tribunal was obliged to go back to the parties. There, it may sound out its concerns, bring up this matter of inflation and even offer its view as to the value of the inflation as well as the source or evidence of that value and then, invite views or submissions of the parties on the matter. The arbitral tribunal is obliged to do so because it takes its jurisdiction from the submission of the parties. Although the parties may have submitted the matter of the counterclaim for the arbitral tribunal's determination, it was only within the terms as found in the points of claim, defence etc. The evidence was entirely of the parties' making and responsibility; not the arbitral tribunal's. The arbitral tribunal does not have inherent or residual powers or jurisdiction in these matters which are almost entirely dictated by the parties.

[50] Hence, the arbitral tribunal ought to have invited the parties to address or make further submissions first before it proceeded to consider and to make this particular item of award. It is this failure that gives merit to Ahmani's complaint that the award contains a decision on a matter beyond the scope of the submission to arbitration under sub-para. 37(1)(a)(v).

[51] In the circumstances, the court is satisfied that Ahmani has established more than sufficient proof on a balance of probabilities of the existence of such decision within the meaning and operation of sub-para. 37(1)(a)(v)

warrants the setting aside of that part of the award. In fact, it may even be said to render the award manifestly unlawful and unconscionable in the terms of *Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791.

[52] Since the award contains a decision on the matter of the inflation or even a decision on the matter of an assessment of a fair amount incurred by the respondent when there is a failure to prove the amount incurred in the first place, this decision is certainly beyond the scope of submission to arbitration by the parties. In such circumstances, the application comes within sub-para. 37(1)(a)(v). Accordingly, that part of the award must be set aside.

[53] With that determination, there is in fact no necessity for the court to address the application under s. 42.

[54] Be that as it may, on the challenge under s. 42 (24C(ARB)-11-03-2015), the court agrees with Petronas that questions 1 and 2 do not come within the test of being real, proper and valid questions of law. The matter of the counterclaim was pleaded and that was what the arbitral tribunal was addressing in the material paragraphs complained of. However, in relation to the third and fourth questions, these are real and not dressed up questions relating to an appeal against the arbitral tribunal's findings.

[55] In the last year or so, there has been a flurry of decisions from the Court of Appeal, all giving guidelines on how to handle s. 42 applications. Unfortunately, none of these cases referred to each other; and it is not immediately clear the reasons. It may perhaps be just a simple case of the different panels (though there were common members in some of these decisions) not being advised by the respective counsel. In civil litigation, until and unless a written judgment is made available, or unless the same counsel is involved, one is generally unaware or not appraised on the latest developments.

[56] In *SDA Architects v. Metro Millennium Sdn Bhd* [2014] 3 CLJ 632; [2014] 2 MLJ 627, the Court of Appeal had advised that a proper and valid question of law is determined by "considering the propriety of the question that is proposed in the context of the facts of the case as a whole, including the issues that have to be dealt with by the arbitrator". Hamid Sultan Abu Backer JCA added that "... the final award of the arbitrator must be viewed in its totality and, any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby justify it to be set aside. (See *Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791)." Petronas has argued that Ahmani has failed to explain in what manner the award affects its rights and how it has affected those rights substantially. All that Ahmani has done is to make a general statement at para. 20 of its supporting affidavit; and that is said to be insufficient.

[57] Then, there is *Awangku Dewa Pgn Momin & Ors v. Superintendent of Lands & Surveys, Limbang Division* [2015] 3 CLJ 1; [2015] MLJU 42, where the Court of Appeal also provided some guidelines when dealing with s. 42 applications in the following terms:

> ... in considering a section 42 reference must not take lightly the duty to critically examine the questions posed by the applicant and to ensure that the question referred to the Court is purely a question of law and not a question of mixed law and fact, and is clearly and concisely framed, before embarking to entertain the application and to answer the question posed. There should be no complication, confusion or duplicity in framing the questions. Instead, there should be simplicity and clarity. The legal burden is on the applicant to ensure that these requirements are strictly complied with.
>
> [28] A High Court in dealing with a section 42 reference must summarily dismiss the application, without even attempting to answer the 'question of law' posed to the Court, if the question is, in the first place, not properly and intelligibly framed; or where it is clear to the Court that there is a disguised attempt by the applicant to appeal against the decision of the arbitral tribunal. In other words, a Court of law must always be vigilant against any attempt by a party to abuse the section 42 procedure as provided for by the Act and to utilise the provision as a backdoor avenue for appealing against the decision of an arbitral tribunal.
>
> [29] Perhaps, to put what we have just said in another way, the High Court must ensure that the question posed by the applicant to Court is a proper and valid question ...

[58] The Court of Appeal cited the same guidelines mentioned above from the decision in *SDA Architects v. Metro Millennium Sdn Bhd* [2014] 3 CLJ 632; [2014] 2 MLJ 627.

[59] Not to be forgotten is the Court of Appeal's decision in *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617. Again, the Court of Appeal felt compelled to set out some "governing principles under s. 42" which can be found at para. 57 and which are not intended to be "exhaustive":

(a) the question of law must be identified with sufficient precision

(b) the grounds in support must also be stated on the same basis

(c) the question of law must arise from the award, not the arbitration proceeding generally

(d) the party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights

(e) the question of law must be a legitimate question of law; and not a question of fact "dressed up" as a question of law

(f) the court must dismiss the reference if a determination of the question of law will not have a substantive effect on the rights of the parties

(g) this jurisdiction under s. 42 is not to be lightly exercised, and should be exercised only in clear and exceptional cases

(h) nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable

(i) the arbitral tribunal remains the sole determiners of questions of fact and evidence

(j) while the findings of fact and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse.

[60] Despite stating these extensive guidelines, the Court of Appeal acknowledged at para. 58 of its judgment that "… the issue of what constitutes "a question of law" is a difficult one".

[61] Hence, the general principle that one can take away from these decisions is that the intervention should only be exercised in clear and exceptional circumstances. The questions of law must only be questions of law and not questions of fact or even questions of mixed fact and law. These questions of law must be identified with sufficient precision or is intelligibly framed citing the grounds or basis relied on. The identified questions of law must also be legitimate, real, proper and valid; and they must arise out of the award and not from or during the proceedings. It must be remembered that the arbitral tribunal remains the sole determinant of the facts and the evidence. The court however, must intervene where the award is manifestly unlawful and unconscionable.

[62] At the risk of repeating what the court has already found satisfactorily proved, that the parties were not invited nor had they addressed the matter of inflation and its impact, application or relevance in computing Petronas' counterclaim for additional costs; and given that at that point of its award, the arbitral tribunal had already found that there was no evidence of the third party's costs which is the root of Petronas' counterclaim; that there was in fact no evidence upon which the arbitral tribunal could proffer its findings and decision; that the arbitral tribunal did not explain where it sourced the factor of inflation; or the value of that factor of inflation in the matter of the computation of additional costs of completing the remaining works; the arbitral tribunal's decision on this matter was certainly and clearly one that it could not and should not have embarked on without first hearing out the parties. Doing so not only exceeded the limits of the dispute that was submitted to the arbitral tribunal for decision, it also breached the rules of fair play and natural justice. The decision of the arbitral tribunal on this

matter is within what has been described in *Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791 as a decision that requires intervention of the court as it "is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby justify it to be set aside"; as recognised by all the decisions of the Court of Appeal.

[63] I am further satisfied that para. 20 of the affidavit filed in support in the facts of this case adequately explains how Ahmani's rights have been affected substantially. Given all these consideration questions 3 and 4 are indeed valid and proper questions of law which the court now answers in Ahmani's favour.

[64] Under such circumstances, the court is inclined to agree with Ahmani that the arbitral tribunal's decision on the counterclaim must be set aside. It is, however, not for this court to substitute its views to the extent of exercising discretion on the award of nominal damages. It is only appropriate and just that that part of the award be set aside.

Conclusion

[65] The net effect of the award is that the award is now varied in items 3 and 4 as follows:

(3)	the respondent's counterclaim is allowed in the sum of	nil
(4)	the respondent is allowed to set off as follows:	
(a)	additional costs incurred by the respondent to complete the remaining 30% of the works	nil
(b)	LAD	RM86,823.40
	LESS	
(c)	performance bond cashed	RM86,823.40
(d)	amount of the claimant's claim allowed	nil
	Total Balance	RM260,019.92

[66] The total amount should therefore read RM260,019.92. Accordingly, the award as varied to RM260,019.92 be awarded to the claimant together with interest on that sum at the rate determined and the same order as to costs.

[67] Petronas does not take the position that the award as varied can be enforced through its application. Consequently, Petronas' application is dismissed.

[68] Finally, the court grants a single order of costs of RM30,000 to Ahmani in respect of all three applications.